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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5710-N-01]

Clarifying Guidance, Waivers, and Alternative Requirements for Hurricane Sandy Grantees in Receipt of Community Development Block Grant Disaster Recovery Funds

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: Previously, the Department allocated \$5,400,000,000 of Community Development Block Grant disaster recovery (CDBG–DR) funds appropriated by the Disaster Relief Appropriations Act, 2013 (Pub. L. 113–2) for the purpose of assisting recovery in the most impacted and distressed areas declared a major disaster due to Hurricane Sandy (*see* 78 FR 14329, published in the **Federal Register** on March 5, 2013). This Notice provides clarifying guidance, waivers, and alternative requirements.

DATES: With the exception of waivers included in this Notice, this Notice is effective on **[Insert date of publication the FEDERAL REGISTER]**. The effective date for waivers in this Notice is **[Insert date 5 days from date of publication in the FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Stan Gimont, Director, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW, Room 7286, Washington, DC 20410, telephone number 202-708-3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339. Facsimile inquiries may be sent to Mr. Gimont at 202-401-2044. (Except for the "800" number, these telephone numbers are not toll-free.) E-mail inquiries may be sent to disaster_recovery@hud.gov.

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I. Background

The Disaster Relief Appropriations Act, 2013 (Pub. L. 113-2, approved January 29, 2013) (Appropriations Act) makes available \$16,000,000,000 in Community Development Block Grant (CDBG) funds for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the most impacted and distressed areas resulting from a major disaster declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 et seq.) (Stafford Act), due to Hurricane Sandy and other eligible events in calendar years 2011, 2012, and 2013.

On March 1, 2013, the President issued a sequestration order in accordance with section 251A of the Balanced Budget and Emergency Deficit Control Act. This provision of law and the order implementing sequestration reduces funding for disaster recovery grants from \$15,980,000,000 to \$15,181,000,000. The \$10 million provided to CPD for administrative costs and the \$10 million provided to the Office of the Inspector General are also each reduced to \$9.5 million.

In a **Federal Register** Notice published March 5, 2013 (78 FR 14329), the Department allocated \$5,400,000,000 after analyzing the impacts of Hurricane Sandy and identifying unmet needs. This Notice provides clarifying guidance, waivers, and alternative requirements to grantees in receipt of an allocation under the Appropriations Act.

II. Applicable Rules, Statutes, Waivers, and Alternative Requirements

The Appropriations Act authorizes the Secretary to waive, or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or the use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment). Waivers and alternative requirements are based upon a determination by the Secretary that good cause exists and that the waiver or alternative requirement is not inconsistent with the overall purposes of title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*) (HCD Act). Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5.

This section provides additional waivers and alternative requirements to Hurricane Sandy grantees, and clarifies or modifies guidance provided at 78 FR 14329. For each waiver and alternative requirement described in this Notice, the Secretary has determined that good cause exists and the action is not inconsistent with the overall purpose of the HCD Act. Grantees may request additional waivers and alternative requirements from the Department as needed to address specific needs related to their recovery activities. Under the requirements of the Appropriations Act, regulatory waivers must be published in the **Federal Register** no later than five days before the effective date of such waiver.

1. Action Plan for Disaster Recovery criterion for approval—Elevation Requirements.

Paragraph 1(a)(3) at 78 FR 14333 is hereby amended by deleting that paragraph and replacing it in its entirety with the the following:

A description of how the grantee will promote: (a) sound, sustainable long-term recovery planning informed by a post-disaster evaluation of hazard risk, especially land-use decisions that

reflect responsible flood plain management and take into account possible sea level rise; and (b) how it will coordinate with other local and regional planning efforts to ensure consistency.

In addition, grantees must adopt and meet the following minimum requirements for approval: in order to better ensure a sustainable long-term recovery, grantees must elevate (or may, for certain non-residential structures as described below, floodproof) new construction and substantially improved structures one foot higher than the latest Federal Emergency Management Agency (FEMA) issued base flood elevation. This standard and criterion for approval of an Action Plan was made after considering the history of FEMA flood mitigation efforts. This higher elevation also takes into account projected sea level rise, which is not considered in current FEMA maps and National Flood Insurance Program premiums, which will potentially rise as FEMA Flood Insurance Rate Maps that take Hurricane Sandy into account are issued.

Each grantee must include in its Action Plan a description of how it will ensure compliance with the requirement that it will not use grant funds for any activity in an area delineated as a special flood hazard area or equivalent in FEMA's most recent and current data source unless it also ensures that the action is designed or modified to minimize harm to or within the floodplain. At a minimum, actions to minimize harm must include elevating or floodproofing new construction and substantial improvements to one foot above the base flood elevation and otherwise acting in accordance with Executive Order 11988 and 24 CFR part 55. The relevant data source and best available data under Executive Order 11988 is the latest issued FEMA data or guidance, which includes advisory data (such as Advisory Base Flood Elevations) or preliminary and final Flood Insurance Rate Maps.

Executive Order 11988 on floodplain management requires that federal agencies use the best available flood data to determine the location of projects and activities. In addition, best

available flood risk data must be used to determine requirements for reconstruction, and the elevation of structures for grants funding (in whole or part) new construction and substantial-improvements as defined at 24 CFR 55.2(b)(8). If a new construction or substantial improvement project or activity is located in a floodplain, the lowest floor must be designed using the base flood elevation, determined in accordance with the best available data, plus one foot as the baseline standard for elevation. If higher elevations are required by locally adopted code or standards, those higher standards would apply.

Instead of elevating non-residential structures that are not critical actions as defined at 24 CFR 55.2(b)(2), grantees may design and construct the project such that below the flood level, the structure is floodproofed using the best available flood data plus one foot. Floodproofing requires structures to be water tight with walls substantially impermeable to the passage of water and with structural components having the capability of resisting hydrostatic loads, hydrodynamic loads, the effects of buoyancy or higher standards required by the FEMA National Flood Insurance Program as well as state and locally adopted codes. All mixed-use structures must be floodproofed consistent with the latest FEMA guidance.

Each grantee that submitted an Action Plan prior to the publication of this Notice must amend its Plan to address this modified requirement. This revision will be treated as a non-substantial amendment and does not require a public comment period. Revised plans must be submitted to the Department within thirty (30) days of the effective date of this Notice.

2. State of New York—counties eligible for CDBG-DR assistance. HUD is amending 78 FR 14330 to define “most impacted and distressed counties” to include counties that meet the revised threshold that will be used for non-Sandy allocations under Public Law 113-2. The new threshold identifies “most impacted counties” as counties with at least \$10 million in damages.

Of counties eligible for CDBG-DR assistance from the devastation of Hurricane Sandy, Westchester County, New York, meets this new threshold in addition to the “most impacted counties” already identified in FR 14330. As such, Table 2 at 78 FR 14330 is amended to identify the following counties as the most impacted and distressed: Nassau, Suffolk, Rockland, and Westchester. In addition, to provide consistency among CDBG disaster recovery appropriations, HUD has determined that any county within the State of New York that received a Presidential declaration under FEMA-4020-DR (Hurricane Irene) or FEMA-4031-DR (Tropical Storm Lee) is eligible to receive assistance under the Appropriations Act. However, the State must expend at least 80 percent of its CDBG-DR allocation in its most impacted and distressed counties.

3. *Waiver to permit some activities in support of the tourism industry (State of New York only)*. The State of New York has requested a waiver to allow the State to use CDBG-DR funds to support its \$53.9 billion tourism industry and promote travel to communities in the disaster-impacted areas. Tourism in Sandy-impacted counties generates approximately \$32.5 billion, \$1.7 billion of which is created by disaster-affected businesses. In the surge area alone (nine of the 14 impacted counties), Hurricane Sandy affected 32,282 businesses; the Long Island tourism industry lost approximately 6,000 jobs due to Sandy’s impact. Without this waiver, the State estimates a \$500 million loss in revenue.

Tourism industry support, such as a national consumer awareness advertising campaign for an area in general, is ineligible for CDBG assistance. However, HUD understands that such support can be a useful recovery tool in a damaged regional economy that depends on tourism for many of its jobs and tax revenues and has granted similar waivers for several CDBG-DR disaster recovery efforts. As the State of New York is proposing advertising and marketing

activities for this specific program, rather than direct assistance to tourism-dependent businesses, and because the measures of long-term benefit from the proposed activities must be derived using indirect means, 42 U.S.C. 5305(a) and 24 CFR 570.489(f) are waived only to the extent necessary to make eligible use of no more than \$30 million for assistance for the tourism industry. CDBG-DR funds may be used to promote a community or communities in general, provided the assisted activities are designed to support tourism to the most impacted and distressed areas related to the effects of Hurricane Sandy. This waiver will expire at the end of the State's two-year expenditure period.

4. Tenant-based rental assistance (New York City only). The City of New York has found that low-income households were disproportionately impacted by Hurricane Sandy. Of the renters that registered for FEMA assistance, almost 65 percent had annual incomes less than \$30,000. As of March 2013, nearly 1,200 households (almost 3,000 people) remain in hotels or interim facilities as a result of Hurricane Sandy, while an unknown number are living in unsafe conditions or "doubled-up".

To assess the permanent housing needs of displaced persons and families, and to match those households with available housing units, the city's Department of Housing Preservation and Development (HPD) created a "housing portal". To date, more than 1,600 households have registered for assistance; 84 percent of these have incomes at or below 50 percent of the area median income. Meanwhile, HUD and FEMA are activating the Disaster Housing Assistance Program (DHAP), which could potentially address some households' need for rental assistance. However, DHAP is limited to one year, and the program requirements include evidence of sufficient financial assets to support a post-DHAP housing plan, which will exclude most extremely low-income households. Many of these households require a longer subsidy period so

that they can develop a permanent housing plan. Thus, the Department is waiving 42 U.S.C. 5305(a), to the extent necessary to make eligible rental assistance payments on behalf of low-income households (at or below 50 percent of the area median income) displaced by Hurricane Sandy. Displaced households that have rejected public housing assistance, or declined a Section 8 voucher, will not be eligible. This waiver will expire at the end of the State's two year expenditure period.

5. Program income alternative requirement. The following changes and additions are made to Paragraph 17 at 78 FR 14341. Paragraphs a.(1)(h) through (j) are replaced, paragraph a.(1)(k) is added, and paragraph (2) is replaced with the following:

(h) Interest earned on funds held in a revolving fund account;

(i) Interest earned on program income pending disposition of the income;

(j) Funds collected through special assessments made against nonresidential properties and properties owned and occupied by households not of low and moderate income, if the special assessments are used to recover all or part of the CDBG-DR portion of a public improvement; and

(k) Gross income paid to a unit of general local government or subgrantee of the unit of general local government from the ownership interest in a for-profit entity acquired in return for the provision of CDBG-DR assistance.

(2) "Program income" does not include the following:

(a) The total amount of funds, which does not exceed \$35,000 received in a single year from activities, other than revolving loan funds that is retained by a unit of general local government and its subgrantees (all funds received from revolving loan funds are considered program income, regardless of amount);

(b) Amounts generated by activities eligible under section 105(a)(15) of the Act and carried out by an entity under the authority of section 105(a)(15) of the Act;

(c) Payments of principal and interest made by a subgrantee carrying out a CDBG-DR activity for a unit of general local government, toward a loan from the local government to the subgrantee, to the extent that program income received by the subgrantee is used for such payments;

(d) The following classes of interest, which must be remitted to HUD for transmittal to the Department of the Treasury, and will not be reallocated under section 106(c) or (d) of the Act:

(i) Interest income from loans or other forms of assistance provided with CDBG-DR funds that are used for activities determined by HUD to be not eligible under § 570.482 or section 105(a) of the Act, to fail to meet a national objective in accordance with the requirements of § 570.483, or to fail substantially to meet any other requirement of this subpart or the Act;

(ii) Interest income from deposits of amounts reimbursed to a state's CDBG-DR program account prior to the state's disbursement of the reimbursed funds for eligible purposes; and

(iii) Interest income received by units of general local government on deposits of grant funds before disbursement of the funds for activities, except that the unit of general local government may keep interest payments of up to \$100 per year for administrative expenses otherwise permitted to be paid with CDBG-DR funds.

(e) Proceeds from the sale of real property purchased or improved with CDBG-DR funds, if the proceeds are received more than 5 years after expiration of the grant agreement between the state and the unit of general local government.

* * * * *

6. Assistance to businesses, including privately-owned utilities. Paragraph 1(d)(3) at 78 FR 14335 is hereby amended to be consistent with the alternative requirement as stated in paragraph 41 at 78 FR 14347. While Paragraph 41 discussed both small businesses and private utilities, the paragraph at 1(d)(3) only discussed small businesses. Thus, grantees in receipt of an allocation under the Appropriations Act are subject to the following: when CDBG-DR funds are provided to for-profit businesses, such funds may only be provided to a small business, as defined by the SBA under 13 CFR Part 121. CDBG-DR funds may not be used to assist a privately-owned utility for any purpose.

7. Modification of certification. Paragraph 42(n) at 78 FR 14348 is replaced with the following: The grantee will not use grant funds for any activity in an area delineated as a special flood hazard area or equivalent in FEMA's most recent and current data source unless it also ensures that the action is designed or modified to minimize harm to or within the floodplain. The grantee further certifies that at a minimum, actions to minimize harm will include elevating or floodproofing new construction and substantial improvements to one foot above the base flood elevation and otherwise acting in accordance with Executive Order 11988 and 24 CFR part 55. The relevant data source for this provision is the latest issued FEMA data or guidance, which includes advisory data (such as Advisory Base Flood Elevations) or preliminary and final Flood Insurance Rate Maps.

Grantees that have provided this certification in compliance with the previous Notice must resubmit the revised language to the Department within thirty (30) days of the effective date of this Notice.

III. Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number for the disaster recovery grants under this Notice are as follows: 14.269.

IV. Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD

Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

Date: April 15, 2013

Mark Johnston
Deputy Assistant Secretary for Special
Needs Programs

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